UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil No. 16-81710-CIV-Marra/Matthewman

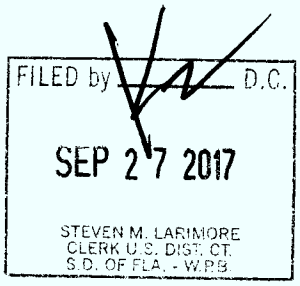
DARRYL ASHMORE,

Plaintiff,

vs.

NFL PLAYER DISABILITY AND NEUROCOGNITIVE BENEFIT PLAN,

Defendant.



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ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO COMPEL [DE 25]

THIS CAUSE is before the Court upon Plaintiff, Darryl Ashmore's ("Plaintiff") Motion to Compel Better Responses to Interrogatories and Request for Production ("Motion") [DE 25]. This matter was referred to the undersigned by United States District Judge Kenneth A. Marra. *See* DE 13. Defendant, NFL Player Disability and Neurocognitive Benefit Plan ("Defendant"), filed a Response [DE 29], and Plaintiffs filed a Reply [DE 30]. The Court held a hearing on the matter on August 31, 2017. At the hearing, the Court required that the parties submit the administrative record, as well as the emails produced by Defendant to Plaintiff during discovery, for *in camera* review to aid the Court in ruling on the Motion. The Court has carefully reviewed the Motion, Response, Reply, and the submitted materials, and this matter is now ripe for review.

BACKGROUND

In the Complaint [DE 1], Plaintiff, a former NFL player, makes a claim under ERISA for total and permanent disability benefits. Defendant denied Plaintiff's application for benefits when he did not appear at his medical examinations set by Defendant. Plaintiff's position is that he asked for certain travel accommodations before he could attend his medical examinations, Defendant appeared to be considering those requests, and then Defendant suddenly denied Plaintiff's claim on the basis that he had failed to attend the medical examinations. Defendant's position is that Plaintiff failed to appear for three medical examinations scheduled in Atlanta, Georgia, on November 2, 3, and 4, 2015, and that he failed to provide proper advance notice of his non-attendance as required by the NFL Player Disability and Neurocognitive Benefit Plan (the "Plan"); therefore, his request for disability benefits was properly denied.

Plaintiff is seeking two basic categories of discovery.[1] First, he is moving to compel all information known to individuals in a non-ministerial role who were involved in Plaintiff's application and appeal, information about who these individuals are, and what role these individuals played in Plaintiff's application and appeal, as well as all related documents. Second, Plaintiff is moving to compel information and documents that show defense counsel's non-ministerial involvement in the underlying decision-making process regarding Plaintiff's application and appeal, to the extent that defense counsel had any involvement at all.

Defendant primarily argues that no additional discovery is necessary because the decision on Plaintiff's application was straightforward, the entire administrative record has already been

[1] Although the initial motion to compel [DE 25] addressed numerous specific interrogatories and requests for production, after conferral, counsel for the parties have narrowed the discovery dispute to these basic categories of discovery.

produced, and Plaintiff has not shown that additional discovery would be material to his claims in this case.

ANALYSIS

The undersigned has carefully considered the voluminous documents submitted for *in camera* review. Additionally, the undersigned has carefully reviewed the parties' papers, counsel's arguments at the discovery hearing held on August 31, 2017, and the applicable law. The Court finds that the pending lawsuit centers on whether or not Defendant properly or improperly denied disability benefits to Plaintiff due to his failure to appear in Atlanta, Georgia on November 2, 3, and 4, 2015, for medical examinations. As there is no dispute that Plaintiff did not appear for the three referenced medical examinations, the relevant areas of inquiry for discovery are whether or not Plaintiff made reasonable requests for travel accommodations and for accommodations as to the location of the medical examinations and duration of the medical examinations, and whether or not Defendant properly considered or attempted to accommodate any such reasonable requests.

In general, the Court rejects Defendant's position that no additional discovery is required to be produced to Plaintiff as everything is contained within the administrative record compiled by Defendant. The administrative record is compiled by Defendant, and a plaintiff should not have to be prejudiced if the administrative record compiled by Defendant is incomplete. Also, in general, the Court rejects Plaintiff's position that virtually everything contained in Defendant's file, and every person in any way involved in the disability denial process, are discoverable. Rather, the Court finds that additional relevant and proportional discovery should be allowed in this case. The question then becomes what precisely constitutes relevant and proportional discovery in an ERISA case.

Courts have permitted limited discovery in ERISA cases in which the arbitrary and capricious standard is applicable,

> in order to assist the court in evaluating 1) the exact nature of the information considered by the fiduciary in making the decision; 2) whether the fiduciary was competent to evaluate the information in the administrative record; 3) how the fiduciary reached its decision; 4) whether, given the nature of the information in the record, it was incumbent upon the fiduciary to seek outside technical assistance in reaching a 'fair and full review' of the claim; and 5) to determine whether a conflict of interest existed.

Cerrito v. Liberty Life Assur. Co. of Boston, 209 F.R.D. 663, 664 (M.D. Fla. 2002). Additionally, the Middle District of Florida has permitted discovery beyond what Defendant deems the "administrative record" when "'[f]acts known to the administrator' could include information not within the claims file, and the discovery sought by Plaintiff is relevant to this inquiry." *Rosser-Monahan v. Avon Prod., Inc.*, 227 F.R.D. 695, 699 (M.D. Fla. 2004).

a. The First Category of Discovery

With regard to the first category of discovery, Defendant argues that the entire administrative record has been produced, along with some additional emails regarding Plaintiff's requests for travel accommodations, so no other discovery is permissible or appropriate. However, Plaintiff argues that the administrative record appears to be missing documents, that Defendant did not produce the emails until its hand was forced during the discovery process, and that Plaintiff still does not really understand why his benefits were denied.

Based upon the arguments presented by counsel and the voluminous documents reviewed *in camera* by the undersigned, the Court has some concerns about whether all of Plaintiff's requests for accommodations were provided to the Disability Initial Claims Committee ("Committee") or Disability Board ("Board"). In other words, a simple of review of the letters denying Plaintiff's application and appeal and the minutes from meetings may not be sufficient if

other communications about Plaintiff's accommodation requests were taking place behind the scenes, but the Committee and Board were simply told that Plaintiff had not appeared for his medical examinations. The Court is not making a finding that this occurred. Nor is the court making a finding at this juncture as to whether Plaintiff's requests for accommodations were reasonable or not. However, upon reviewing the documents *in camera*, it does appear that certain items were produced in discovery in this case which may be relevant to the ultimate determination of this action and yet are not contained within the administrative record compiled by Defendant.

The Court wants to ensure that all correspondence and papers which relate to Plaintiff's requests for accommodations, Defendant's responses to those requests, and Plaintiff's non-appearance at the Atlanta medical examinations and reasons therefore are produced by Defendant. Therefore, the Court orders Defendant to conduct a further search and to ensure that all such documents have been produced within ten (10) days from the date of this Order. Defendant shall then certify that all such documents have been produced or it shall produce any additional documents it locates and then certify that all such documents have been produced. However, in regard to Plaintiff's request for names of all persons in a non-ministerial role who were involved in Plaintiff's application and appeal, it is clear that such information has already been provided to Plaintiff. In fact, a review of the administrative record and the additional emails reflects the names of many persons involved, and Defendant has provided other names to Plaintiff. No further discovery on this issue is proportional or relevant.

b. The Second Category of Discovery

With regard to the second category of discovery, defense counsel, Michael Junk, Esq., stated in open court that he was not aware of any involvement in the decision-making process by anyone at his law firm, Groom Law Group. Mr. Junk also represented that he had run an email

search for emails to the Committee or Board. Defense counsel conceded at the discovery hearing that the fiduciary exception to the attorney-client privilege applies to such documents. Therefore, in an abundance of caution and because such discovery is permitted by the relevant case law, the Court will require defense counsel to run a law firm-wide email search using the search term "Ashmore." Defendant shall then produce to Plaintiff, within ten (10) days of the date of this Order, any emails or documents that are relevant to the issue of whether defense counsel was involved in the Board's and/or the Committee's decisions regarding Plaintiff's application and appeal and/or are relevant to show that defense counsel was involved in counseling or advising on Plaintiff's requests for accommodations.

Based on the foregoing, it is hereby **ORDERED** as follows:

1. Plaintiff's Motion to Compel Better Responses to Interrogatories and Request for Production [DE 25] is **GRANTED IN PART AND DENIED IN PART**.
2. Within ten (10) days of the date of this Order, Defendant shall serve upon Plaintiff supplemental discovery responses in accordance with this Order.

DONE and ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 27th day of September, 2017.

WILLIAM MATTHEWMAN
United States Magistrate Judge